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NINTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

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Addendum

CONTENTS

		Paragraphs	Page
II.	PART TWO - QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION	37 - 64	3
	A. Introductory remarks	37 - 39	3
	B. Jurisdiction of the court	40 - 59	3
	1. Possible draft provision	40	4
	2. Commentary	41 - 59	4
	Paragraphs 1 and 2	41 - 53	4
	Paragraph 3	54 - 55	8
	Paragraph 4	56 - 58	8
	Paragraph 5	59	8

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CONTENTS (continued)

	Paragraphs	Page
C. Criminal proceedings	60 - 64	9
1. Possible draft provision	60	9
2. Commentary	61 - 64	9

II. PART TWO - QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

A. Introductory remarks

37. As indicated in paragraph 3 of the present report, in resolution 45/41 the General Assembly invited the Commission "to consider further and analyse the issues raised in its report on the question of international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism". The General Assembly thus refrained, at least at that stage, from choosing between resort to a system of universal jurisdiction, the establishment of an international criminal court or the establishment of some other trial mechanism. Moreover, the Assembly did not pronounce on the possible options and main trends evidenced in the Commission, an account of which had been given by the Commission in its latest report, 11/ with regard to some very specific and significant areas related to the creation of an international criminal court.

38. The present report therefore does not present a draft statute of an international criminal court. The aim of the report is to give rise to an in-depth discussion of two major issues that must be solved in order to provide the Special Rapporteur with the necessary guidance. The issues in question are the court's jurisdiction and the requirements for instituting criminal proceedings.

39. The two provisions set out below by the Special Rapporteur therefore do not represent draft articles for referral to the Drafting Committee or for incorporation, as they stand, into the draft statute of a court. They are simply intended to provide a basis for discussion and, perhaps, to reveal an overall trend that would be a useful guide to the Special Rapporteur.

B. Jurisdiction of the court

1. Possible draft provision

40. For the purposes indicated in the preceding paragraph, the Special Rapporteur has drafted the following text:

> "1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it.

11/ Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), paras. 116-157.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.

3. The Court shall have cognizance of any challenge to its own jurisdiction.

4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of applications for review of sentences handed down in respect of the same crime by the courts of different States.

5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law."

2. Commentary

Paragraphs 1 and 2

41. Since paragraph 1 refers to the code of crimes against the peace and security of mankind or a text defining such crimes annexed to the statute, it observes the principle of nullum crimen sine lege. It takes account of the comments by Commission members expressing their opposition to the concept of a crime under international law or to any reference to the general principles of law in order to define crimes. This provision will perhaps meet with their approval.

42. Moreover, the purpose of the alternative wording inside square brackets, namely, the words "accused of crimes defined in the annex to the present statute", is to avoid limiting the choice of States to the crimes specified in the draft code, thus making the court's rules on jurisdiction ratione materiae more flexible, which could make it more readily acceptable to States.

43. Paragraph 1 makes the court's jurisdiction ratione personae subject to the consent of the States concerned. Here again, the Special Rapporteur has thus taken account of the comments of Commission members expressing concern that the criminal jurisdiction of States should be respected. It would, of course, be of no avail to draw up a rule that would remain a dead letter, or to set up an institution that would be incapable of taking any action right from the outset.

44. On the issue of the number of States whose conferment of jurisdiction is required, the 1953 draft statute for an international criminal court specified:

"No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed." 12/

45. While using that draft article as a basis, the present Special Rapporteur has departed from that text in a number of respects.

46. Firstly, in paragraph 1 of his draft provision the Special Rapporteur has made conferment of criminal jurisdiction upon the court subject to the consent of the State or States in which the crime is alleged to have been committed. In the Special Rapporteur's view, although in international law there is no general rule limiting criminal jurisdiction to the law of the place where the crime is committed, it has to be acknowledged that the principle of the territoriality of criminal law is the principle generally applied. The trend towards having crimes tried in the place where they are committed was confirmed by the Nürnberg and Tokyo charters. It is thus the principle of the territoriality of criminal law that is laid down in paragraph 1.

47. The Special Rapporteur is aware that there are other principles, including the principle of personality under criminal law, that have been applied in the field of criminal law. However, that principle has several aspects, of which the 1953 draft takes only one into account, namely, the aspect giving jurisdiction to the court of the country of which the perpetrator is a national, and excluding the jurisdiction of the court of the country of which the victim is a national and the jurisdiction of the court of the victim State. This latter system, which, depending on the particular case in question, is also referred to as the system of passive personality or real protection, has also been applied in the area of war crimes, for example in the French statute of 28 August 1944, which gave the French courts jurisdiction over war crimes committed abroad against French nationals or French-protected persons, or against foreign soldiers or stateless persons serving in the French armed forces. Similarly, article 7 of the former French code of criminal procedure, now article 694 of the new code of criminal procedure, gives the French courts jurisdiction over crimes against the security of the State involving the counterfeiting of coins, seals, securities and bank notes committed outside French territory by foreigners. This system was also applied, immediately after the Second World War, under the legislation of other countries, as in the case of the Danish Act of 12 June 1946, the Norwegian Decree of 4 May 1945 and the Norwegian Act of 13 December 1946.

12/ Report of the 1953 Committee on International Criminal Jurisdiction, Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645), annex, article 27.

48. This trend also took hold in international law. In 1927 the international conference for the unification of criminal law, held at Warsaw, adopted model texts, article 5, paragraph 1, of which recognized the jurisdiction of the victim State over a crime or an offence against the security of that State involving State seals, marks, imprints or stamps. The text in question is virtually identical to that of the French code of criminal procedure just mentioned.

49. The trend was also confirmed in the Lotus case. According to the Permanent Court of International Justice, there is no rule of international law preventing a State from exercising jurisdiction over foreigners in respect of offences committed abroad against the State in question. 13/

13/ The Court stated the following:

> "The first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present." (PCIJ, Collection of Judgments, series A.-No.10), Judgment No. 9, 7 September 1927, pp. 18-19.)

And further on it stated the following:

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (Ibid., p. 20.)

50. In view of the background to which reference has just been made, it might be asked why the 1953 draft required only conferment of jurisdiction by the State where the crime is committed or by the State of which the victim is a national, thus restricting the range of States that can claim jurisdiction over the offences in question. In paragraphs 1 and 2 the Special Rapporteur has therefore combined the territoriality system, the active and passive personality system, and the so-called real-protection system, thus better demonstrating the complexity of the matter and better reflecting the state of existing law.

51. The Special Rapporteur is aware, however, of the reservations to which an excessive broadening of the range of States whose conferment of jurisdiction would be required could give rise. Such a broadening would lay down a set of conditions to which the court's jurisdiction would be subject, conditions which would constitute a veritable obstacle course. It could, moreover, give rise to numerous jurisdictional disputes among all the States whose consent would be required. Even if, under paragraphs 3 and 4 of the draft provision, the court had jurisdiction over such disputes, it would seem preferable to reduce to the extent possible the likelihood of disputes occurring in the first place. It must be acknowledged that, apart from the system of the territoriality of criminal law, which is the general rule governing domestic criminal law, basically the systems in question are simply exceptions resulting from the realism of States. It is, however, in order to take account of such realism that, in addition to the principle of territoriality, formulated without any restrictions in paragraph 1 of the draft provision, the active and passive personality system and the real-protection system have been included in paragraph 2, but only to the extent that the domestic legislation of the States concerned requires their application in a specific case.

52. This solution is not without drawbacks. Conferring jurisdiction upon a State of which the perpetrator is a national is, in some cases, tantamount to entrusting a State that may have ordered that a criminal act should be committed, or may have organized or tolerated such an act, with trying the crime in question. Moreover, conferring jurisdiction upon the victim State or upon the State whose nationals have been the victims of a crime does not appear always to provide sufficient guarantees of impartiality and objectivity.

53. Furthermore, in general it must be recognized that the principle of conferment of jurisdiction is a makeshift solution, a necessary concession to State sovereignty. It is a principle that makes the court's jurisdiction subject to a requirement that is difficult to meet, and that will not facilitate access to the court. It is therefore to be hoped that the requirement in question will be of an entirely temporary nature, no more than a stage in the process of establishing a body of international criminal law free from domestic law and less affected by the rules of domestic law.

Paragraph 3

54. This paragraph lays down a current rule whereby any court seized shall decide whether it has jurisdiction, when a challenge to its jurisdiction is submitted to it, unless an appeal in respect of its decision is lodged with a higher court, where appropriate.

55. However, since the criminal court is regarded as the highest international criminal court, it would normally decide on its own jurisdiction and there would be no possibility of appeal.

Paragraph 4

56. Paragraph 4 deals with another example. In this case it is not the court's jurisdiction that is being challenged, as in the hypothesis dealt with in the paragraph above. Instead, it is a question of a dispute between two or more States concerning the jurisdiction of one of the States concerned, or a dispute in which the States challenge one another's jurisdiction. This is a very familiar kind of dispute. Such disputes arise from the fact that each State sets its own rules governing criminal jurisdiction; conflicts between different forms of domestic legislation inevitably arise as a result. States attempt to settle such disputes by means of agreements, which are often difficult to reach.

57. The solution put forward in paragraph 4 would make it possible to overcome such difficulties because, as just indicated, the court would have jurisdiction over such disputes. Furthermore, the solution in question would facilitate the standardization of judicial practice in the area of conflicting laws and jurisdiction.

58. Lastly, one must not exclude the hypothesis whereby the courts of two or more States would institute proceedings in respect of the same crime and hand down decisions resulting in either a conviction or an acquittal, which would be contrary to the non bis in idem principle. In such a case, the court could review or rescind the most recent decisions.

Paragraph 5

59. Paragraph 5 is based on the idea that the court could also play a very important role in the unification of international criminal law, a new field of law currently undergoing extensive development. It could help to remove some uncertainties regarding terminology and the definition of a number of concepts, such as complicity and conspiracy and the attempt to commit such crimes, whose content varies from one country to the next. It could also facilitate clarification of the meaning and the content under international law of a number of principles, such as the principles of nullum crimen sine lege and nulla poena sine lege or the non bis in idem rule.

C. Criminal proceedings

1. Possible draft provision

60. For the purposes indicated in paragraph 39 above, the Special Rapporteur has drafted the following text:

> "1. Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted by States.
>
> 2. However, in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes."

2. Commentary

61. It could be envisaged that the Security Council, the guardian of international peace and security, could be competent to institute criminal proceedings itself, directly. However, such an interpretation of the Security Council's role would exceed the powers vested in the Council by the Charter. The Council's role is either to take preventive measures to forestall a breach of the peace or to take steps to restore peace. However, all such measures are political and are not of a judicial nature at all. It is therefore hard to see what basis there would be for sole jurisdiction for the Security Council in the area of criminal proceedings instituted in respect of the crimes in question.

62. However, it can be asked whether in some cases criminal proceedings should not be made subject to the Security Council's prior consent. Some of the crimes covered by the draft code constitute significant violations of international peace. This is so particularly in the case of the crimes of aggression and the threat of aggression. Under Article 39 of the Charter of the United Nations, the Security Council has the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression". It must therefore be agreed that in such cases criminal proceedings should be subject to determination by the Security Council of the existence of an act of aggression or a threat of aggression.

63. Consequently, should a State attempt to seize the court directly, without the prior consent of the Security Council, the court should refer the complaint to the Security Council for its prior consideration and consent.

64. On the other hand, it would appear that where other offences are concerned - war crimes, crimes against humanity and, in particular, genocide or international traffic in narcotic drugs - the consent of a United Nations organ is not necessary.